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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 5

HARRY H. NEUBERGER,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REHEARING OF PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Second Supplemental Memorandum for Petitioner.

JOSEPH M. PROSKAUER,
WALTER MENDELSOHN,
WILBUR H. FRIEDMAN,
Counsel for Petitioner.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 548.

HARRY H. NEUBERGER,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REHEARING OF PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Second Supplemental Memorandum for Petitioner.

Petitioner regrets the necessity of burdening this Court with an additional memorandum, but since the memorandum filed by the respondent in this case implies that the petitioner has withheld information from the Court in failing to call attention to the decision of the Court of Claims on January 8, 1940 in *Mosbacher* v. *United States,* leave is respectfully requested to file a second supplemental memorandum.

There is nothing in the *Mosbacher* case which detracts from petitioner's contention that the decision of the Court of Claims in the *Craik* case foreshadows a favorable decision in the *Central Hanover* case. The *Craik* case, in a careful opinion, took the position that partnership income must be deemed to have been re-

ceived by the partners directly. One of the issues common to the *Central Hanover* and *Neuberger* cases is whether a partner is entitled to credit for that portion of the partnership's commission income represented by commissions he himself paid to the partnership. The Court of Claims appears never to have decided this question, it was not involved in the *Mosbacher* case, and the decision in the *Craik* case appears to require the conclusion that such credit be allowed.

As one of the issues involved in the instant case was not presented in the *Mosbacher* case at all, the Government is not justified in saying "that the precise question involved in the present case was decided against petitioner's position by the Court of Claims less than a month prior to the decision in the *Craik* case. *Mosbacher* v. *United States*".

Moreover, Judge Whitaker, who wrote the opinion in both the *Mosbacher* and *Craik* cases, appears not to have thought that the *Mosbacher* case required decision of either of the present issues. His statement of the issue in the *Mosbacher* case follows:

> "In this case plaintiff seeks to offset certain losses which he claims he sustained in trading on the New York Curb Exchange against his profits therefrom. The issue is whether the losses were sustained by him individually or by an alleged partnership or joint venture of which plaintiff was a member."

The only issue tried was whether the transactions in question were partnership or individual transactions. While the plaintiff in the *Mosbacher* case might have argued that the security transactions should be reflected in his individual return even though they were partnership transactions (that being one of the

questions in the instant case), he did not do so, and the Court was not asked to decide the point.

There was no discussion of the question believed to be decisive here, as to whether partnership income retains its identity in the hands of the partners. The *Mosbacher* case was not referred to in the *Craik* case, which followed it by less than a month, and in which the Court of Claims for the first time reviewed the law relative to the nature for tax purposes of partnership income.

Petitioner reiterates his contention that the treatment of partnership income as retaining its identity in the hands of the partners in the *Craik* case is in conflict with the treatment of the partnership commission and security items in the *Neuberger* case, and that therefore certiorari should be granted. In the alternative, the Court is requested to defer action on the petition for rehearing in this case until the Court of Claims decides the *Central Hanover* case.

Respectfully submitted,

JOSEPH M. PROSKAUER,
WALTER MENDELSOHN,
WILBUR H. FRIEDMAN,
Counsel for Petitioner.

February, 1940.